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Supreme Court, U.S.
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No. 90-___

In The

Supreme Court of the United States

October Term, 1990

STEPHEN IVY AND CHARLENE IVY,

Petitioners,

v.

ROBERT W. MYERS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Free Exercise Clause of the First Amendment to the United States Constitution prohibit a Bankruptcy Court from refusing to confirm a Chapter 13 Plan because the debtor's Chapter 13 budget contains a deduction for a monthly tithe mandated by the debtor's sincerely held religious beliefs?

2. Is a tithe, motivated by a debtor's sincerely held religious beliefs, permitted as a "reasonably necessary" expense in a debtor's Chapter 13 budget?

3. Did the Bankruptcy Court lack jurisdiction to deny confirmation pursuant to 11 USC Section 1325(b)(1) of debtors' Chapter 13 Plan where no interested party filed an "objection" to confirmation as defined by Bankruptcy Rule 3020?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Stephen Ivy and Charlene Ivy ("Ivys"), respectfully pray that this Court issue a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, filed December 10, 1990.

OPINIONS BELOW

The unpublished memorandum decision of the Court of Appeals for the Ninth Circuit is reprinted at Appendix A. The unpublished opinion of the United States District Court for the District of Oregon (Frye, J.) is reprinted at Appendix B. The unpublished supplemental opinion of the United States Bankruptcy Court for the District of Oregon (Hess, J.) is reprinted at Appendix C. A partial transcript of the adjourned confirmation hearing containing the oral ruling of the United States Bankruptcy Court for the District of Oregon (Hess. J.) is reprinted at Appendix D.

JURISDICTION

The Court of Appeals' order affirming the District Court was filed on December 10, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). This petition for writ of certiorari is filed within the 90 day period prescribed by 28 U.S.C. 2101(c) as computed in accordance with Rule 13.4 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . "

Other relevant statutes and rules are reprinted at Appendix E:

11 U.S.C. Section 1322(c)
11 U.S.C. Section 1325
11 U.S.C. Section 1329(a)
Bankruptcy Rule 3020(b)
Bankruptcy Rule 9009

STATEMENT OF THE CASE

This matter came before the bankruptcy court on the Ivys' motion for confirmation of their Chapter 13 plan ("Plan"). The Plan was a thirty-six month plan and would have paid their unsecured creditors a dividend of approximately twenty-seven percent. No interested party filed objections to confirmation of the Plan. The Chapter 13 trustee orally expressed concern for one item in the Chapter 13 budget which was a deduction of $365 per month for a tithe to the Ivys' church. The bankruptcy court denied confirmation of the Plan on the basis that the Plan was not proposed in "good faith" so long as the Ivys insisted on including a tithe in their Chapter 13 budget. The bankruptcy judge said that he would permit the Ivys to extend the Plan beyond the three-year limit set by 11 U.S.C. Section 1322(c) if the Ivys would agree to

continue making monthly payments until an amount equal to their tithes had been made up. The bankruptcy judge estimated that his proposal would require the Ivys to pay eighteen additional monthly plan payments of $745 each. In his written "Supplemental Opinion", the bankruptcy judge reasoned that the effect of allowing a tithe would be "to permit the debtor to require that his creditors contribute to his chosen charity." App. C at App. 9 (quoting *In re Curry*, 77 Bankr. 969, 970 (Bankr. S.D. Fla. 1987)).

On review, the United States District Court for the District of Oregon affirmed the bankruptcy court. Subsequent to filing the Ivys' appeal to the court of appeals for the Ninth Circuit, the bankruptcy judge requested, and the Ivys agreed, to make the scheduled proposed plan payments to the Chapter 13 trustee as a condition to continuing to receive the protection of the automatic stay of 11 U.S.C. Section 362. The Ivys have made all thirty-six scheduled monthly plan payments called for under the Plan. However, the case is not moot because the issue remains whether the Ivys must make an additional eighteen payments to obtain confirmation of the Plan.

The court of appeals ruled that it was "not necessary . . . to determine . . . whether denial of the plan amounted to an unconstitutional infringement on the Ivys' freedom to practice their religion." App. A at App. 3. The court of appeals held that the extension suggested by the bankruptcy court would have accommodated the Ivys' sincerely held religious beliefs. The court said the Ivys were trying to accommodate their religious beliefs at the expense of their creditors.

The evidence at the confirmation hearing established that the Ivys' belief in tithing was sincerely held and actually practiced preceding the filing of their petition for relief. All courts below accepted the sincerity of the Ivys' beliefs when rendering their decisions.

REASONS TO ALLOW THE WRIT

I. The Decision Below is in Direct Conflict with Recent First Amendment Decisions of this Court.

The bankruptcy court's refusal to confirm the Ivys' Plan forces them to choose between following the precepts of their religion or forfeiting the right to confirmation of their Chapter 13 plan. In *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987), the state of Florida sought to deny unemployment compensation to Paula Hobbie who refused to work on Saturdays, the Sabbath under her religion, and lost her job as a result. The state claimed that her job was available to her but that she was discharged for misconduct for choosing not to work on Saturdays. Because she was discharged, the state claimed she was not eligible for unemployment compensation. This Court held that:

> "[W]here [the state] denies [an important] benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."

Id. at 141 (quoting *Thomas v. Review Bd., Employment Security Div.*, 450 U.S. 707, 717-718 (1981) (emphasis omitted)).

A free exercise inquiry properly "asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling government interest justifies the burden." *Jimmy Swaggert Ministries v. Board of Equalization*, 110 S. Ct. 688, 693 (1990) (quoting *Hernandez v. Commissioner*, 109 S. Ct. 2136, 2148 (1989)). This "is to ensure that incentives to practice a religion are not adversely affected by government action." McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1146 (1990).

The continued vitality of *Hobbie* was reaffirmed in this Court's recent ruling in *Employment Division, Department of Human Resources v. Smith*, 110 S. Ct. 1595, 1598 (1990). In that case, this Court held that the State of Oregon could deny unemployment compensation consistent with the free exercise clause for work related criminal misconduct which was religiously motivated. The misconduct was the sacramental use of peyote. The Oregon Supreme Court had previously held that the sacramental use of peyote violated Oregon's controlled substance law. *Smith*, 110 S. Ct. at 1598 (citing *Smith v. Employment Div. Dep't of Human Resources*, 307 Or. 68, 72-73 (1988)). The critical distinction between *Smith* and the other unemployment cases[1] was that "the conduct at

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[1] The unemployment cases are: *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment*

(Continued on following page)

issue in those cases was not prohibited by law." *Smith*, 110 S. Ct. at 1598. This Court further stated that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 1600.

There is no law prohibiting a religious adherent from tithing to the church of his choice. If Congress were to enact such a law it clearly would be unconstitutional. Because tithing itself may not be constitutionally regulated or prohibited, it follows that the federal government may not deny or condition obtaining relief under Chapter 13 upon a person's refusal to cease tithing, absent at least a showing of a compelling state interest.

The burden on the free exercise of religion is not avoided by the bankruptcy judge's proposal to extend the plan for eighteen months. The proposed extension would require the Ivys to pay more, and to be under the jurisdiction of the bankruptcy court longer, than a non-tithing debtor in the same circumstances, thereby placing a substantial burden on the Debtors' right to freely exercise their religion. An analogous situation existed in *Hobbie*, where the Appeals Commission contended that Paula Hobbie faced "only a limited disqualification from receipt of benefits, and that once this fixed term has been served, 'she [would] again be on an equal footing with all other

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Appeals Comm'n, 480 U.S. 136 (1987); *Thomas v. Review Bd., Employment Sec.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). The *Smith* opinion omitted *Frazee* from its discussion.

workers.' " 480 U.S. at 142-143 (citation and footnote omitted). The Appeals Commission argued that such a limited disqualification provision was "less coercive" than the complete disqualification invalidated in *Sherbert v. Verner*, 374 U.S. 398 (1963), and "the burden it impose[d] on free exercise [was] therefore permissible." *Hobbie*, 480 U.S. at 143. This Court held "[t]his distinction is without substance" and "the disqualification penalty is substantial." *Id.* Just as the limited disqualification from unemployment benefits was held to be an unconstitutional infringement on the free exercise of religion, so too would be the bankruptcy court's attempt to coerce the Debtors to extend their plan.

The court of appeals did not believe the Ivys were unfairly burdened if the Ivys were required to remain in Chapter 13 for an additional eighteen months as the price of continuing to practice their religious beliefs. Each of the lower courts apparently concluded that the Ivys would achieve their stated goal (a discharge under Chapter 13), even though it might take eighteen months longer. It was once thought acceptable in some parts of our country to tell a black person to ride in the rear of the bus on the presumption he would still get to his intended destination at the same time as the other passengers. This Court does not tolerate second class citizenship based on a person's race and it should not tolerate a second class citizenship in our bankruptcy courts based on a person's religion.

The bankruptcy judge said that permitting a debtor to tithe during the performance of his Chapter 13 plan is tantamount to requiring a debtor's creditors to contribute

to the debtor's church. Petitioners find it hard to accept such a view for two reasons.

1. In order to achieve confirmation of any Chapter 13 plan, the Bankruptcy Code requires that the plan must pay as much or more to the creditors than they would receive if the debtor were to file a case under Chapter 7. 11 U.S.C. Section 1325(a)(4). Because of this requirement, there is no possibility that the creditors in a Chapter 13 are subsidizing the debtors' religion. They must receive as much or more than they would get if the debtor filed a petition under Chapter 7. In the Ivys' case, the creditors stood to receive approximately twice as much under the Plan as the creditors would have received if the Ivys had filed a petition under Chapter 7.

2. In other areas of law, religious activities which clearly cost non-believers additional money are accommodated. The most notable example is that contributions to religious organizations are tax deductible. I.R.C. Section 170(c)(2)(B). In 1987, the year the Ivys filed their petition for relief, the amount for charitable and religious contributions itemized on income tax returns filed with the Internal Revenue Service totalled in excess of $49.6 billion. Internal Revenue Service, *Statistics of Income – 1987 Individual Income Tax Returns* 50 (1990). The lost revenue must be made up by the other taxpayers. Similarly, real property owned by religious organizations is widely exempted from real property taxes, again forcing secular taxpayers to subsidize the exemption. See *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). Although the universe among which the burden is spread is larger than the universe in a Chapter 13 case, the principle is the same. The Ivys find it a difficult proposition of constitutional

law that permits tax deductions for religious contributions under the Internal Revenue Code, and permits exemptions from real property taxes for property owned by religious organizations, but prohibits tithes under the Bankruptcy Code.

II. The Decision Below Opens the Door for Substantial Abuse of the First Amendment Rights of Thousands of Future Petitioners in Bankruptcy.

The decision of the court of appeals below is fraught with First Amendment inconsistencies and has the potential for countless future First Amendment abuse. Consider all of the following scenarios which are presented as examples of the illogical and constitutionally impermissible results which would flow naturally from the decision below if it is not overturned by this Court:

A. Assume that the plaintiff in *Hobbie* was a debtor performing under a Chapter 13 plan when she informed her employer that because of her conversion to the Seventh Day Adventist Church, she would no longer be able to work on her Sabbath, from sundown on Friday to sundown on Saturday. In a five-day work week, this could result in a direct reduction of twenty percent of Hobbie's income. Assume that her employer did not fire her but was willing to permit her to continue working on a four day week and that the monthly payments under the hypothetical Chapter 13 plan were precisely twenty percent of income. Under 11 U.S.C. Section 1329(a), a debtor may amend his plan after confirmation in response to changes in the debtor's economic circumstances. Where there is a reduction in income, a debtor is

routinely permitted to reduce his plan payments accordingly. In this example, Hobbie would seek to amend the plan to reduce her payments to reflect her twenty percent reduction in disposable income. Could a bankruptcy court refuse to amend a Chapter 13 plan to reflect the reduction in disposable income, or would a court hold that the amendment was proposed in bad faith since income from Saturday employment is available to the debtor, but she refuses to work for religious reasons, thus preferring her beliefs over her creditors? Is a religious adherent's refusal to work on his sabbath, which results in the reduction of disposable income for creditors in a Chapter 13 plan any different than working a full five days a week, yet making a ten percent tithe? In either case, the creditors receive less. Creditors would receive significantly more from a debtor who works five days a week and tithes than they would from the debtor who only works four days a week (assuming that a four-day work week results in a twenty percent reduction in disposable income from a five-day week).

B. Establishing a rule that tithing during a Chapter 13 plan is impermissible "per se" unfairly burdens a debtor's religion by prohibiting a debtor from voluntarily foregoing secular expenses, such as recreation, alcohol, vehicles or a reserve for contingencies, which the bankruptcy courts routinely allow, in favor of a tithe to a church of a debtor's choice. The tithe is more important to that debtor than the secular expenses. Under the decisions below, no matter how many secular expenses a debtor was willing to forgo, he would still not be permitted to tithe without extending his plan and making extra payments.

Pursuant to 11 U.S.C. Section 1325(b) it is a court's duty to consider the listed expenses individually and as a whole to determine whether the debtors' plan meets the disposable income test. *In re Jones*, 65 Bankr. 462, 466 (Bankr. D. Minn. 1985) There was no finding that the Ivys' budget, taken as a whole, was not reasonably necessary for the maintenance and support of the Ivys or dependents of the Ivys. Focusing solely on the Ivys' tithe was an improper approach. A court should examine the other listed expenses in the budget using the same reasonable and necessary standard. *In re Sutliff*, 79 Bankr. 151, 159 (Bankr. N.D.N.Y. 1987)

In this case, the Ivys allocated approximately one percent of their net income ($50 monthly) to recreation. If instead the Ivys had allocated four percent to recreation, and had included a two percent reserve for a contingency factor, both of which are reasonable and routinely allowed, there would have been no increase in the monthly plan payments to creditors even if the Ivys had discontinued their tithe, when the loss of the tax deduction for the tithe is taken into account. Honest debtors, such as the Ivys, should not be punished merely for ordering their priorities in favor of a tithe versus other permissible expenditures and disclosing that fact on the face of their budget, instead of taking full advantage of otherwise allowable deductions in their budget, and then subsequently applying the available money to a tithe instead of to the budgeted expenditures.

A reasonable allowance for "recreation" is universely permitted in the Chapter 13 budget. Recreation is defined in *Webster's Ninth New Collegiate Dictionary* 985 (1984), as:

" . . . to create anew, restore, refresh; . . . refreshment of strength and spirits after work."

For a religious adherent, the participation in the fundamental tenets of his religion, including his duty to tithe, results in a "refreshment of strength and spirits after work". Is recreation permissible so long as it is not religious recreation? For the Ivys, as is true for many religious adherents, their religion is their recreation. What if the Ivys had listed their tithe not in the category on the official form of the Chapter 13 budget for "Religious and Other Charitable Contributions", but rather in the category for "Recreation", with the additional explanation "church activities"? If the Ivys' church sponsors a roller skating party for which there is no admission charge, but donations are "requested", are the Ivys prohibited from making the "donation" because they are in Chapter 13? Clearly the participants are expected to "donate". Such events are dependent upon the "donations" of those who attend. Likewise, there is no "admission charge" to attend church, but "donations" are clearly requested and churches could not survive if those attending did not make contributions. See *In re Moses*, 59 Bankr. 815 (Bankr. N.D. Ga. 1986).

If the court has the power to order a religious adherent to make up payments for his tithes, but does not order a secular debtor to make up for expenses such as recreation, including movies, dances or alcohol consumption, the court has preferred secular expenses over the religious expenses, thereby impermissibly burdening the religious adherent. If it is not "bad faith" to make creditors "pay" for a debtor's recreation then it is also not

"bad faith" to make creditors "pay" for the debtor's religion.

C. The Ivys' Chapter 13 budget reveals that Mrs. Ivy does not work and therefore has no income. Assume arguendo that the only reason she does not work is because her religious beliefs dictate that she should stay at home to raise the Ivys' child. She is well educated and employment is readily available to her. Could the bankruptcy judge compel the Ivys to extend their plan to pay the same amount to creditors that would have been available if Mrs. Ivy was working instead of staying home to raise her child? The rationale is the same. Why should the Ivys be permitted to pay less than a dual wage-earner family in the same circumstances if Mrs. Ivy would otherwise work except for her religious beliefs?

D. Could not a bankruptcy court, when faced with a petition by a childless couple, instruct them that the court will not tolerate the birth nor adoption of any children during the performance of the plan, since the debtors would be more prudent to wait until they could better afford the cost of children? Could the court inform them that if they have children, the court would expect them to make up for the expenses associated with the children by extending their payments beyond thirty-six months?

E. Because the Bankruptcy Code prohibits payments longer than a five-year period (11 U.S.C. Section 1322(c)), there will be cases where the plan cannot be extended long enough to make up for the tithes. A constitutional rule of law must be uniform. *Gallagher v. Evans*, 536 F.2d 899, 902 (10th Cir. 1976). The bankruptcy judge's suggestion should not be adopted because it will lead to

uneven results. What would the rule be if the initial plan proposed was already a 5 year plan and therefore could not be extended? A tithe is either a permitted deduction, or it isn't. If a tithe is permitted, a debtor should not be compelled to make up for the deduction by extending the length of a plan.

The decision below ignores a central feature of the Bankruptcy Code, which is to permit an "honest but unfortunate debtor" to achieve a "fresh start". *Grogan v. Garner*, 111 S. Ct. 654, 659 (1991). The "fresh start" concept not only permits a debtor to begin his life anew, free of a crushing debt burden, but also requires that the bankruptcy court permit him to keep certain basic essential possessions, which are declared exempt, so that a debtor can maintain his personal dignity. In discussing the purpose for bankruptcy exemptions, the Eighth Circuit has stated that "bankruptcy courts must keep in mind the social policies which generate exemptions" one of which is " '[t]o protect the dignity and the cultural and religious identity of the debtor. . . . ' " *Panuska v. Johnson* (*In re Johnson*), 880 F.2d 78, 82 (8th Cir. 1989) (quoting *Norwest Bank Nebraska, N.A. v. Tveten*, 848 F.2d 871, 876 (8th Cir. 1988)). This same social policy of preserving the debtor's dignity and religious identity should be likewise applicable in analyzing the reasonableness of a debtor's proposed expenses in a Chapter 13 budget.

III. The Decisions of the Lower Courts are in Conflict.

Except for the court of appeals below, no circuit court has addressed (in a reported decision) whether religious contributions are permissible expenses in a Chapter 13

budget. The traditional basis for granting certiorari to resolve a conflict among the circuits therefore does not exist here. However, the lack of decisions at the circuit level is not due to the unimportance of the issue, but rather to the financial inability of the class of persons adversely affected to prosecute an appeal.

Four cases hold that a religious contribution is a "reasonable and necessary" expenditure. See *In re Bien*, 95 Bankr. 281 (Bankr. D. Conn. 1989); *In re Wood*, 92 Bankr. 264 (Bankr. S.D. Ohio 1988); *In re Navarro*, 83 Bankr. 348 (Bankr. E.D. Pa. 1988); and *In re Davis*, 68 Bankr. 205 (Bankr. S.D. Ohio 1986).

Five decisions apparently hold that religious contributions are not per se impermissible, but found that the specific religious contributions proposed were not reasonable and necessary under the facts and circumstances presented in the particular case. See *In re Reynolds*, 83 Bankr. 684, 685 (Bankr. W.D. Mo. 1988) ("This Court may not and must not say what if any portion of debtor's income shall go to support his personal religious beliefs, but this Court may determine what constitutes those items reasonably necessary 'to be expended – (A) for the maintenance or support of a debtor or a dependent'." "This court chooses to establish no hard and fast rule as to what amount or percentage of charitable contribution it will construe as 'reasonably necessary'.") (citation omitted)); *In re Chrzanowski*, 70 Bankr. 447, 450 (Bankr. D. Del. 1987) (refusing to confirm debtor's plan which contained substantial religious and charitable contributions where the debtor also continued to accumulate savings through a thrift plan, an IRA, drove a new car, maintained a membership in a country club and retained

additional funds for recreation); *In re Sturgeon*, 51 Bankr. 82, 84 (Bankr. S.D. Ind. 1985) (religious contribution was not reasonably necessary); *In re Breckenridge*, 12 Bankr. 159, 160 (Bankr. S.D. Ohio 1980) ("Church tithes, per se, are certainly not held in disfavor by this Court."); *In re Cadogan*, 4 Bankr. 598, 600 (Bankr. W.D. La. 1980) (debtor was advised by the court that in view of the small payout to unsecured creditors that if "she wished to continue making this contribution [her tithe], other expenditures would have to be reduced").

Three decisions apparently hold that religious or charitable contributions are per se unreasonable and never permitted. See *In re Tucker*, 102 Bankr. 219, 220 (Bankr. D.N.M. 1989); *In re Miles*, 96 Bankr. 348, 350 (Bankr. N.D. Fla. 1989); *In re Curry*, 77 Bankr. 969, 970 (Bankr. S.D. Fla. 1987).

Only three decisions discuss the constitutional issues relating to denial or confirmation of Chapter 13 plans based on a debtor's decision to make religious contributions. See *Miles*, 96 Bankr. at 350 (refers to the holding of *In re Green*, 73 Bankr. 893 (Bankr. W.D. Mich. 1987) that to deny confirmation on the basis of a religious contribution would constitute violation of the constitutional separation of church and state, but declines to follow *Green* without analysis); *Navarro*, 83 Bankr. at 352, 353 (the free exercise clause is not an issue and confirmation of a plan in which the debtor proposes to continue religious contributions does not violate the establishment clause); *Green*, 73 Bankr. at 895, aff'd 103 Bankr. 852 (W.D. Mich. 1988) (denial of confirmation on the basis of religious contributions would violate free exercise clause and confirming a

plan which includes religious contributions does not violate the establishment clause).

Of the foregoing decisions, apparently only one was appealed, and that appeal was by a well-financed creditor (the Michigan Department of Education, which was the holder of an unpaid student loan). See *Green*, 103 Bankr. 852. Apart from the Ivys' appeal, there do not appear to be any appeals brought by debtors on this issue.

CONCLUSION

Ours is a religious society. Approximately forty-nine percent of the U.S. population are "Christian Church Adherents" and two and a half percent of the population are Jewish. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1990*, at 58 (110th ed.). During the fiscal year ending June, 1990, approximately 200,000 petitions for relief under Chapter 13 were filed in the United States bankruptcy courts. Administrative Office of the U.S. Courts, *Bankruptcy Statistical Information* (Sept. 1990). Restricting the right to tithe in Chapter 13 therefore potentially affects thousands of debtors, who will be forced to give up one of their most sacred duties to their God as a condition to receiving a "fresh start" in Chapter 13.

For all of the reasons set forth in this Petition, this Court should issue a writ of certiorari in this case to review the decision of the United States Court of Appeals for the Ninth Circuit.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

In re: STEVEN [sic] IVY; CHARLENE IVY, Debtors.	No. 88-3769
STEVEN [sic] IVY; CHARLENE IVY, Plaintiffs-Appellants, v. ROBERT W. MYERS, Trustee, Defendant-Appellee.	D.C. No. CV-88-141-FR MEMORANDUM* (Filed Dec. 10, 1990)

Appeal from the United States District Court
for the District of Oregon (Portland)
Helen J. Frye, District Judge, Presiding

Argued and Submitted October 1, 1990
Seattle, Washington

Before: HUG and DW NELSON, Circuit Judges, WALKER,** District Judge

Debtors Steven and Charlene Ivy appeal the district court's affirmance of the bankruptcy court's denial of confirmation of their proposed reorganization plan under

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Hon. Vaughn R. Walker, United States District Judge for the Northern District of California, sitting by designation.

Chapter 13 of the Bankruptcy Code. The Ivys contend that the bankruptcy court's denial of their plan, which included a monthly tithe to their church based on ten percent of their annual income, unconstitutionally burdened their right to the free exercise of their religion in violation of the First Amendment to the United States Constitution. We have jurisdiction under 28 U.S.C. § 158(d), and we affirm.

A Chapter 13 reorganization plan may not be confirmed unless the debtor proposes to pay into the plan all of the debtor's disposable income. 11 U.S.C. § 1325(b)(1)(B). "Disposable income" is defined in relevant part under the Code as "income which is received by the debtor and which is not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor." *Id.* § 1325(b)(2)(A).

This definition comports with the Code's requirement that a plan only be confirmed if it is proposed in good faith. *Id.* § 1325(a)(3). While not defined expressly in the Code, "good faith" has been held to require, "at least, that the debtor is willing to pay to the trustee for the benefit of his creditors *all* of his disposable income after provision for his necessary and reasonable living expenses and a reasonable contingency." *In re Curry*, 77 Bankr. 969, 969 (Bankr. S.D. Fla. 1987) (emphasis added).

In the present case, the Ivys' plan, along with the monthly tithe, proposed 36 monthly payments to unsecured creditors amounting to payment of approximately 27 percent of their total unsecured debt. The bankruptcy court denied the plan, concluding that, under these circumstances, the monthly charitable contribution

did not constitute a reasonably necessary living expense. The court found that the plan's exclusion of the tithe from the amount of disposable income payable to the Ivys' creditors would effectively require the creditors to contribute to the Ivys' chosen charity.

It is not necessary for us here, however, to determine whether the tithe constituted a reasonably necessary living expense or whether denial of the plan amounted to an unconstitutional infringement on the Ivys' freedom to practice their religion. In denying the plan, the bankruptcy court indicated it would confirm an amended plan that allowed the proposed monthly tithe if the Ivys would extend their 24 monthly payments of $745 an additional 18 months. Eighteen additional monthly payments of $745 would amount to an additional $13,410 of payments available to the Ivys' creditors. As the bankruptcy court pointed out, this would have resulted in payments into the plan in "the same amount that somebody who was not required to tithe would have paid in a period of 36 months," the length of time initially proposed in the Ivys' plan.

Thus, the bankruptcy court, rather than ruling that the existence of the tithe was, under any circumstances, an unreasonable living expense, instead presented the Ivys an alternative that would have allowed the tithe in the proposed amount at no expense to the Ivys' creditors. This alternative would have provided satisfactory payment to creditors while simultaneously accommodating the Ivys' sincerely held religious beliefs. In rejecting the amended plan, the Ivys instead sought to choose accommodation of their religious beliefs at the expense of their creditors. We decline to hold that this satisfies the Code's

requirements. Accordingly, the judgment of the district court is **AFFIRMED.**

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In re:	Bankruptcy No. 387-02293-H13
STEVEN [sic] IVY and CHARLENE IVY,	Civil No. 88-141-FR
Debtors.	OPINION
	(Filed March 11, 1988)

Robert J. Vanden Bos
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Attorneys for Debtors

Robert W. Myers
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Portland, Oregon 97219-0388

Trustee

FRYE, Judge:

In the matter before the court, the debtors, Steven [sic] and Charlene Ivy, appeal from an order of the Honorable Henry L. Hess, Jr., United States Bankruptcy Judge, denying confirmation of their reorganization plan submitted pursuant to Chapter 13 of the United States Bankruptcy Code.

The reorganization plan submitted by the Ivys to Judge Hess indicates that they owe $8,525 in back taxes and $53,360 in unsecured debts. The reorganization plan calls for thirty-six monthly payments to creditors: four payments of $200; eight payments of $595; and twenty-

four payments of $745. The reorganization plan also provides for a household budget, which includes a monthly tithe to the Ivys' church in the sum of $365 per month.[1]

Judge Hess denied confirmation of the reorganization plan but indicated to the Ivys that an amended plan would be confirmed if it provided for forty-two monthly payments of $745 to creditors rather than twenty-four monthly payments of $745 to creditors. Judge Hess reasoned that the Ivys should be required to pay to their unsecured creditors the same amount that debtors who did not tithe would have to pay to their unsecured creditors.

The Ivys argue that the failure of Judge Hess to confirm their reorganization plan was an unconstitutional infringement upon their first amendment right to freely exercise their chosen religion and imposes upon them a substantial burden because of their religious beliefs.[2]

APPLICABLE LAW

This court reviews the determination of the bankruptcy court *de novo*. *In re American Mariner Indus., Inc.*, 734 F.2d 426, 429 (9th Cir. 1984).

A reorganization plan will not be confirmed unless the bankruptcy court finds that the plan has been proposed in good faith. 11 U.S.C. § 1325(a)(3) (1985). Good

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[1] Tithing is the donation of ten percent of a household's income to a church. The Ivys' net after-tax income in 1986 was $37,787. The Ivys contributed $3,654 in 1986 to their church.

[2] This court accepts as true the Ivys' statement that their beliefs are sincere and that tithing is a regular family practice.

faith requires that debtors be willing to pay to their trustees, for the benefit of their creditors, all of their disposable income after provision for their necessary and reasonable living expenses and a reasonable contingency. *In re Sturgeon*, 51 Bankr. 82, 83 (Bankr. S.D. Ind. 1985).

ANALYSIS AND DECISION

The Ivys argue that *In re Green*, 73 Bankr. 893 (Bankr. W.D. Mich. 1987), is persuasive on the issue before the court because it is the only decision that deals with tithing from a constitutional standpoint. In *Green*, the State of Michigan, an unsecured creditor of Green, objected to the confirmation of Green's reorganization plan because the plan included a monthly tithe as an expense. The court confirmed the plan, and in so doing, stated that it could not deny confirmation solely based on tithing, nor could it condition confirmation upon the debtors ceasing to tithe.

Green is distinguishable from this case, however. In denying confirmation of the Ivys' reorganization plan, Judge Hess stated that he would allow the Ivys to tithe, but would require the Ivys to pay their debts just as other debtors who did not tithe would have to pay their debts. While the court denied the confirmation of Ivys' reorganization plan, the court did not require the Ivys to cease tithing. Instead, the court proposed an amended reorganization plan which would allow the Ivys to freely practice their religion as well as to satisfy their legal obligations to their creditors.

The bankruptcy court's denial of the Ivys' reorganization plan is affirmed.

DATED this 11 day of March, 1988.

/s/ Helen J. Frye
Helen J. Frye
United States
District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re	)	Case No.
	)	387-02293-H13
STEPHEN C. IVY	)	SUPPLEMENTAL
CHARLENE R. IVY	)	OPINION
Debtors.	)	(Filed Nov. 27, 1987)
	)	
	)	Unpublished

At the adjourned hearing on confirmation in this case on August 13, 1987, the court rendered its oral opinion denying confirmation of the debtors' Chapter 13 Plan. This opinion supplements that oral opinion.

The court in the case of *In re Curry* (Bkrtcy. S.D. Fla. 1987), 77 B.R. 969 held that a plan providing for a distribution of 26% upon general unsecured claims was in bad faith. The plan provided monthly payments of $125 for three years. In his statement of income the debtor stated that he deducted $103 as a payroll deduction for "tithe to church deducted from pay." This voluntary contribution represented almost half of the debtor's disposable income after payment of his necessary living expenses. At page 969 the court states:

> Good faith requires, at least, that the debtor is willing to pay to the trustee for the benefit of his creditors all of his disposable income after provision for his necessary and reasonable living expenses and a reasonable contingency. A charitable contribution, at least to the degree provided in this case, does not constitute a reasonably necessary living expense. The effect of such a deduction is to permit the debtor to require that his creditors contribute to his chosen charity. I do not believe that the statute

contemplates such a result nor do I consider that I have discretion to permit this debtor to achieve that result.

I do not overlook the fact that there are published opinions by several of my colleagues who have reached a contrary result. Nor have I overlooked the fact that Official Form 10, authorized by B.R. 9009, provides a space to list "religious and other charitable contributions" in the debtor's budget, item 4(b)(15). The Official Forms do not override the statute. They were not approved by Congress nor by the Rules Committee. Therefore, they provide no indication of legislative intent. The Forms, though prescribed by the Judicial Conference (B.R. 9009) do not, I take it, constitute judicial precedent that religious and charitable contributions may, in effect, be imposed by a chapter 13 debtor upon his creditors.

The Confirmation of the debtor's plan is denied. The debtor is granted leave to amend his plan to increase his monthly payment in the amount of $103, the voluntary payroll deduction presently provided for the benefit of his employer church. In all other respects, the plan meets the requirements for confirmation.

This court agrees with the reasoning of *In re Curry*.

DATED this 27th day of November, 1987.

/s/ Henry L. Hess, Jr.
Henry L. Hess, Jr.
Bankruptcy Judge

cc: Robert J. Vanden Bos

APPENDIX D

UNITED STATES BANKRUPTCY COURT

DISTRICT OF OREGON

BEFORE THE HONORABLE HENRY L. HESS
Bankruptcy Judge

In re	)	No. 387-02293-H13
	)	
STEPHEN and CHARLENE IVY,	)	ADJOURNED
	)	CONFIRMATION HEARING
Debtors.	)	
	)	Partial transcript,
	)	examination and Court's
	)	oral ruling

TRANSCRIPT OF PROCEEDINGS

August 13, 1987

Recorded by:
Lee Swaney

SOFT-TECH
Recording and Transcribing Services
615 2nd Street – Oregon City, OR 97045 – (503) 655-5443

* * *

EXAMINATION

(Of Stephen Ivy)

[p. 10] BY THE COURT:

Q When I go through the budget – not, the budget, but the Chapter 13 statement that lists the debts, you

show taxes owing of $8524, and, including those, you show a total unsecured debts of $53,360. When I look at the unsecured debts, except for minor exceptions, they all appear to be charge accounts and credit cards?

A That's correct. The majority of those are indeed – these are the type of accounts that have cash withdrawals on them, and that was used – that was the method of income I used during the time I was starting a new business.

[p. 11] Q So some of this money went into a new business?

A A large percentage of it, yes.

Q I see. Did you inform any of these people from whom you borrowed money that you might not be able to repay because you do have an obligation to tithe, or you wouldn't be able to pay as much as some other person would?

A No, because I'd had a history – most of those people I'd been with for a long, long time and had a history of being able to repay, including my tithe.

Q You recognize that there's at least some moral obligation to repay your debts?

A Yes, sir.

Q I presume that would fit within your religious beliefs?

A That's right. The religious beliefs is that the Lord comes first, and you take your tithe out of your income first, and then you meet the rest of your obligations.

Q Well, I made some calculations that I find that you've limited this plan to 36 months. Your plan provides that you pay four payments – to the trustee, four payments of $200, eight payments of 595, and 24 payments of 745.

A Yes.

Q If, for another person in your circumstances whose religious beliefs did not require tithing, that person would be able to pay in addition to those sums $365 a month?

[p. 12] A Yes.

Q And for – at 36 months, that would mean that that person, who was not required to tithe because of his beliefs, would be paying an additional $13,140 that could be distributed to creditors.

A Yes.

Q You could do that just continuing this plan for an additional 18 months. An additional 18 months at $745 would pay an additional $13,140 to your creditors. If, instead of ending the plan in three years, if you went an additional 18 months, you would have paid into the plan the same amount that somebody who was not required to tithe would have paid in a period of 36 months.

A Hm-hmm. Okay. I follow.

Q Now, I'm wondering if you have any objection to doing that?

A Yeah, I think I could do that.

Q It's hard to believe under those circumstances that this plan should not be confirmed. But the Court would confirm a plan that called for payments of 200 – four payments of $200, eight payments of 595 and – what would that be – and 42 payments of 745, and that would allow you to continue to tithe, but yet pay your creditors the same amount some other person would pay in the period of 36 months.

[p. 13] A Yes.

Q All right. That will be the order of the Court.

THE COURT: Well, if we can handle that by – if that's the debtor's wish, we can handle that just by a simple amendment to paragraph 1 to change the figure of 24 months to a figure of – what did I say? – change the 24 to 42.

Now, I don't know what that would work out in percentages. We do need a calculation here. It probably amounts to, I would say – the way I calculated it, yes, there would be for – available for general unsecured creditors actually 33 percent.

If you take the total payments that this debtor would make, take out the trustee's commission of 16 – or six percent, then provide payment in full to the priority creditors, that would leave 14,000 to go to general unsecured creditors.

And if I've got that figure right – I looked at the summary sheet – no, it's – I'm wrong.

MR. VANDEN BOS: We figured, Your Honor –

THE COURT: No, I'm wrong. I used a figure that excluded the 8,000. But I see they're listed separately. It is 53, but I would – anyway, it leaves – the plan, as proposed, would have a balance of $14,638 that would go to unsecured creditors. By paying an additional 13 percent, it almost doubles the dividend to unsecured creditors.

[p. 14] So I suppose the amendment would have to be – would change 24 months to 42 months, and we'd change paragraph 2(d) to read "approximately" rather than an exact figure, approximately 52 percent – er, I think it would be about 52 percent.

So, Mr. Vanden Bos, if you'd submit a proposed order of confirmation showing those two amendments, then the Court will enter it.

MR. VANDEN BOS: Okay. I'll discuss those with my client, Your Honor, and if that's his intention, we'll submit the order immediately.

THE COURT: Yes. I understand. I'm not – I don't feel I want to bind the debtor right now. But I'm saying that I will refuse confirmation of the present plan, and that I would not confirm a plan that didn't do what these amendments would suggest.

Now, the debtor can decide whether he wants to do that or not do that after he receives your advice.

MR. VANDEN BOS: I understand.

THE COURT: All right.

MR. VANDEN BOS: Thank you, Your Honor.

THE COURT: There are a few things that I wanted to say, since the debtor seemed to agree with me on that suggestion, I probably ought to say some things in the event that he decides that's not what he wants to do, just to make [p. 15] them a part of the record.

The reason I would deny the present plan is that Chapter 13 is for the adjustment of debts. It concerns legal obliga-tions [sic] and not moral obligations. Outside of bankruptcy, gifts, when made while insolvent, can be termed fraudulent conveyances. In a Chapter 7 it could very well be that a Chapter 7 trustee could set aside contributions made to a church for the 12-month period prior to the filing of the bankruptcy because they're gifts without consideration at a time when the debtor's insolvent.

MR. VANDEN BOS: I –

THE COURT: Yes, I think that's true.

MR. VANDEN BOS: Have you seen that done?

THE COURT: Well, you can argue – No, but I see no reason why it couldn't be.

MR. VANDEN BOS: I understand, Your Honor.

THE COURT: Outside of bankruptcy on a garnishment, a debtor is entitled to claim as exempt 75 percent of the net earnings after lawful deductions, or deductions required by law. A debtor cannot claim his obligation to tithe against a garnishment. That would have to come out – if he's going to tithe, it would have to come out of the 75 percent. It's not a deductions required by law.

And the Court doesn't believe that the amounts which the creditors receive in a Chapter 13 case should depend upon [p. 16] whether the debtor desires to make charitable contributions, even though it's required by his religion. This Court believes that such a debtor has the same obligation to pay debts as anyone else.

I estimate that the – I would guess that there are many fewer less than – there's less than five percent of the cases filed where there's any deduction shown for tithing or religious contributions. It just doesn't seem fair to me that a person in that position – fair to the creditors that a person in this debtor's position should receive less than would creditors in a case where the income was the same and the other expenses are the same except that that debtor was not required by his beliefs to tithe.

And that's why I think that in his instance, it really isn't good faith to – for this debtor to get by with 36 months of payments. I think he should stretch his plan out so that his creditors will receive the same as if the next individual had the same income and the same monthly expenses would return to his creditors.

So those are my reasons.

MR. VANDEN BOS: Thank you, Your Honor.

(Proceedings concluded this 13th day of August 1987.)

APPENDIX E

11 USC § 1322(c)

§ 1322. Contents of Plan.

* * *

(c) The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years.

11 U.S.C. § 1325

§ 1325. Confirmation of plan.

(a) Except as provided in subsection (b), the court shall confirm a plan if –

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan –

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder; and

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

(b)(1) If the trustee or the holder of any allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended –

(A) for the maintenance or support of the debtor or a dependent of the debtor; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

11 U.S.C. 1329(a)

§ 1329. Modification of plan after confirmation.

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to –

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

* * *

Bankr. Rule 3020(b).

DEPOSIT; CONFIRMATION OF PLAN

* * *

(b) Objections to and Hearing on Confirmation.

(1) Objections. Objections to confirmation of the plan shall be filed with the court and served on the debtor, the trustee, any committee appointed under the Code and on any other entity designated by the court, within a time fixed by the court. An objection to confirmation is governed by Rule 9014.

(2) Hearing. The court shall rule on confirmation of the plan after notice and hearing as provided

in Rule 2002. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

* * *

Bankr. Rule 9009.

FORMS

The Official Forms prescribed by the Judicial Conference of the United States shall be observed and used with alterations as may be appropriate. Forms may be combined and their contents rearranged to permit economies in their use. The Director of the Administrative Office of the United States Courts may issue additional forms for use under the Code.